

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MOSES WADE,

Defendant-Appellant.

UNPUBLISHED

October 28, 2003

No. 240749

Wayne Circuit Court

LC No. 01-000980-01

Before: Bandstra, P.J., and Hoekstra and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his sentence of two and one-half to four years in prison imposed on his jury conviction of negligent discharge of a firearm with injury resulting, MCL 752.861. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was originally charged with assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b, in connection with the shooting of complainant. Complainant and defendant lived together at one time and were the parents of a son. Complainant testified that she and defendant argued over her relationship with another man, and defendant shot her in the back. Defendant later asked her to write a letter to the police claiming that the shooting was an accident. Complainant acknowledged that she wrote four such letters, but testified that in fact she did not believe the incident was an accident. Defendant testified that he picked up complainant's gun, and that complainant stumbled into him and was shot in the back as a result.

The jury acquitted defendant of the primary charge of assault with intent to commit murder and of the lesser included offense of assault with intent to commit great bodily harm less than murder, MCL 750.84, but convicted him of the lesser included offense of negligent discharge of a firearm with injury resulting. The jury acquitted defendant of felony-firearm.

At sentencing complainant indicated that she obtained a personal protection order against defendant after he appeared at their son's school and her home. The trial court noted that while the probation department scored the sentencing guidelines at zero to nine months, the prosecution scored the guidelines at zero to seventeen months. The trial court stated that it believed that defendant was treated leniently by the jury, but concluded that based on the information before it, it was required to impose a sentence within the guidelines. Thereafter, defendant made a statement in which he asserted that he was appalled by the court and

complainant. He denied that he shot complainant or that she was shot in the back. He accused complainant of fabricating the allegations against him, of neglecting the medical needs of their son, of placing their son in a dangerous environment, and of dealing narcotics. He stated that he knew where complainant lived and worked, but that contrary to her accusations, he had not attempted to contact her. Defendant asserted that complainant was wicked and that he was the actual victim because complainant had the gun in her possession. Thereafter, the trial court stated that defendant's statement provided it with substantial and compelling reasons to exceed the guidelines. The trial court found that defendant was an exceedingly dangerous person, and sentenced him as a third habitual offender to two and one-half to four years in prison, with credit for 321 days.¹

Under the statutory sentencing guidelines, if the upper limit of the recommended minimum sentence range is eighteen months or less, the trial court must impose an intermediate sanction unless it states on the record that a substantial and compelling reason exists to commit the defendant to the jurisdiction of the Department of Corrections. MCL 769.34(4)(a). An intermediate sanction may include a jail term that does not exceed the upper limit of the guidelines range or twelve months, whichever is less. *Id.* An intermediate sanction does not include a prison term. MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).

To constitute a substantial and compelling reason for departing from the guidelines, the reason must be objective and verifiable, and must irresistibly hold the attention of the court. *People v Babcock*, 469 Mich 247, 272; 666 NW2d 241 (2003). Whether a reason for departure is objective and verifiable is reviewed on appeal as a matter of law; whether it constitutes a substantial reason justifying a departure is reviewed for abuse of discretion. *Id.* at 273-274. We will not reverse a departure decision if there are substantial and compelling reasons that would have resulted in the departure, apart from reasons found not to be substantial and compelling on appeal. *Id.* at 273. A departure from the guidelines cannot be reversed as too extensive unless it falls outside the range of principled and reasonable outcomes. *Id.* at 269.

Defendant argues that he is entitled to resentencing because the trial court neither imposed an intermediate sanction nor stated substantial and compelling reasons for imposing a prison term. We disagree. Defendant stated that he knew where complainant lived and worked, and that he intended to do what he thought was necessary in order to protect his son from what he deemed was a dangerous situation. The trial court concluded from these remarks that defendant presented an obvious threat to complainant, that the extent of the threat was not adequately accounted for in the guidelines and that the departure sentence imposed was warranted as a result. Applying the review standards of *Babcock*, *supra*, we affirm.

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

/s/ Stephen L. Borrello

¹ The trial court did not specifically inform defendant that he had the right to appeal his sentence on the ground that it exceeded the guidelines, as required by MCR 6.425(E)(4). However, we deem the error to be harmless because defendant has appealed his sentence on that ground. Defendant was not prejudiced by the error.